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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 654

McGORDON SOUTHALL,
t/a SOUTHALL REALTY CO.,

Petitioner

v.

LILLIE BROWN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

REPORT OF OPINIONS BELOW 2

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED 2

QUESTIONS PRESENTED FOR REVIEW 3

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES OR REGULATIONS WHICH THE CASE INVOLVES 3

STATEMENT OF THE CASE 5

STATEMENT FOR FEDERAL JURISDICTION OF THE COURT OF FIRST INSTANCE 7

ARGUMENT 7

PRAYER 10

CITATIONS

CASES:

County Court v. United States ex rel Douglas, 105 U.S. 733 ... 8

Crocker v. United States, 240 U.S. 74, 60 L.Ed. 533 8

Ets-Hokin & Galvan, Inc. v. Maas Transportation, Inc., 386 F.2d 258 (8th Cir. 1967) 7

Muscahany v. Drummond, 48 S.Ct. 53, 275 U.S. 199, 72 L.Ed. 238 8

Rogers v. Burlington, 3 Wall. 654 8

Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 ... 8

United States ex rel Daly v. McFarland, 28 App.D.C. 552 7

United States v. Mississippi, 364 U.S. 520 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, McGordon Southall, trading as Southall Realty Company, by his attorney, Raphael G. Urciolo, presents this, his petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW

The District of Columbia Court of Appeals entered judgment against the petitioner in favor of the respondent and handed down an opinion which is reported at 237 A.2d 834 (D.C. C.A. 1968).

On petition for rehearing, on April 17, 1968, the District of Columbia Court of Appeals entered an order denying such petition, which order is unreported. That order is attached hereto.

Application to the United States Court of Appeals for the District of Columbia Circuit was denied. Such order was not reported in any official report. Said order is attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The petitioner seeks to have reviewed the judgment of the District of Columbia Court of Appeals, dated February 7, 1968, which was, in effect, affirmed by order of the United States Court of Appeals for the District of Columbia Circuit dated July 16, 1968. Both the judgment of the District of Columbia Court of Appeals and the judgment of the United States Court of Appeals for the District of Columbia Circuit is included in the certified transcript of the record filed herewith.

The statutory provision conferring jurisdiction on the United States Court of Appeals for the District of Columbia Circuit is contained in Title 17-101 D. C. Code (1967).

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia is Title 28-1254 U. S. C. A.

QUESTIONS PRESENTED FOR REVIEW

POINT ONE: Did the Commissioners of the District of Columbia have the power to declare public policy, under the provisions of Title 1-226 D. C. Code, giving them the right to promulgate and enforce reasonable and usual police regulations which are necessary for protection of lives, health, comfort and quiet which was adopted by Act of February 26, 1892, 27 Stat. 394 Res. 4 par 2?

POINT TWO: Did the Commissioners have the right to declare tenancy agreements void, because of alleged violations of the regulations adopted by them under the authority stated in Point One?

POINT THREE: Do the Commissioners of the District of Columbia have the right to impair the obligation of contracts involving tenancy relationship? *And taking property without due process?*

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES OR REGULATIONS WHICH THE CASE INVOLVES

Title 1-226 D. C. Code: REGULATIONS for protection of life, health and property:

> "The Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under sections 1-224, 1-225, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia. (Feb. 26, 1892, 27 Stat. 394, Res. No. 4 par. 2)

Article One, Section 10, United States Constitution:

> "No state shall * * * pass any * * * law impairing the obligation of Contracts."

Fifth Amendment to the United States Constitution:

"No person shall * * * be deprived of * * * property, without due process of law: * * *"

CHAPTER 2, THE HOUSING CODE OF THE DISTRICT OF COLUMBIA, adopted August 11, 1955.

Article 210

Section 2101—Purpose of Regulations.

The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

The Commissioners further find and declare that such unfortunate conditions are due, among other circumstances, to certain conditions affecting the residential buildings and such areas, among them being the following: dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate bathing facilities, or washing facilities, inadequate heating, insufficient protection against fire hazards, inadequate lighting and ventilation, and other insanitary and un-safe conditions.

The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.

The Commissioners accordingly, promulgate these regulations for the purpose of preserving and promoting the health, safety, welfare and morals.

Article 230

Section 2301—Use and Occupancy.

No owner, licensee or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations.

Article 210

Section 2104—Penalty. Any person who fails to comply with any provision of this Code after expiration of the time for compliance established in accordance with this Code shall upon conviction be punished by a fine not to exceed $300, or by imprisonment for not to exceed 10 days, in lieu of or in addition to any fine, for such failure to comply. In event of any failure to so comply, each and every day such violation continues shall constitute separate offense, and the penalties prescribed above shall be applicable to such separate offense, except that no further penalties shall be imposed for the period during which any appeal from a conviction of such offense is pending.

Article 310

Section 3303. Any person who fails to comply with any provision of these regulations shall upon conviction be punished by a fine not to exceed $300.00, or imprisonment not to exceed 90 days for each such failure to comply. In event of any failure to comply with these regulations, each and every day such failure shall constitute a separate offense, and the penalties prescribed above shall be applicable to each of such separate offense.

STATEMENT OF THE CASE

A landlord and tenant action for possession based on nonpayment of rent was filed by petitioner in the landlord and tenant branch of the District of Columbia Court of General Sessions against the respondent as tenant. At the trial it was stipulated rent was in arrears in sum of $230.00. Respondent contended no rent was due under the lease because

it was an illegal contract. The trial court held to the contrary and entered judgment for possession for the petitioner.

Appeal was made to the District of Columbia Court of Appeals and at time of argument the respondent had vacated the premises and did not wish to return to possession. She contended that she had moved the District of Columbia Court of Appeals to hear her appeal so that, if the judgment below were left standing, it would be *res judicata* of any subsequent action if the petitioner filed a debt action for money judgment for the rent.

This principle was accepted by the appellate court. The court reversed, holding the lease agreement to be void and illegal. The evidence at trial had revealed that prior to signing the lease agreement petitioner had been put on notice that certain housing code violations existed. This evidence having been established, respondent contended the lease should have been declared unenforceable because it was entered into in contravention of said housing code.

The District of Columbia Court of Appeals held in effect that the commissioners have power to declare public policy and to declare contracts void (sections 2101 and 2304, housing regulations).

A petition for rehearing was filed April 17, 1968, and the District of Columbia Court of Appeals entered an order ruling as follows:

1. It adhered to its previous decision.

2. Where housing code violations existed at time of execution of a lease, where the owner of the property knew of such violations, the lease is void.

3. That the court did not rule upon any right of the tenant under such a lease to remain in the property or upon any obligation of the tenant to pay for reasonable value of the use of the property during his occupancy.

STATEMENT FOR FEDERAL JURISDICTION OF THE COURT OF FIRST INSTANCE

Title 11-321 D. C. Code, 1967 Ed.

ARGUMENT

Points One and Two: Did the Commissioners of the District of Columbia Have the Power To Declare Tenancy Agreements Void Because of Alleged Violations of the Housing Code Adopted Under Title 1-226 D.C. Code, Act of Congress, Feb. 26, 1892, 27 Stat. 394, Res. 4, par. 2, and Did Congress Give to the Commissioners the Power To Declare Public Policy?

It is not disputed that Congress gave to the Commissioners of the District of Columbia under the aforesaid code provision, Title 1-226, the right to promulgate and enforce reasonable and usual police regulations which are necessary for protection of lives, health, comfort and quiet of persons and protection of all property. But, did this Act also include the right to legislate and declare public policy? The inclusion of sections 2101 of Article 210 and 2301 of Article 230 of the housing code is an attempt to legislate and declare public policy. Declaration of public policy, or provisions declaring contracts void are not provisions which make or enforce police regulations.

Ets-Hokin & Galvan, Inc. v. Maas Transportation, Inc., 386 F.2d 258 (8th Cir. 1967), was a similar case where motor carrier regulations adopted by the Interstate Commerce Commission were violated. The court held that the Commission, an administrative agency, was not given authority by Congress to declare contracts void. In *United States ex rel Daly v. McFarland*, 28 App. D.C. 552, it was explicitly held that the District of Columbia had no legislative power—that the Commissioners had only such power as expressly granted them. Nowhere in Title 1-226 is any right given the Commissioners to declare contracts void.

County Court v. United States ex rel Douglas, 105 U.S. 733; *Rogers v. Burlington,* 3 Wall. 654; and *Water, Light & Gas Co. v. Hutchinson,* 207 U.S. 383.

In the same vein, regarding Section 2101, Article 210 of the housing code, no such declarations of policy were granted by Congress. There is a host of cases to this effect: *Crocker v. United States,* 240 U.S. 74, 60 L.Ed. 533; *United States v. Mississippi,* 364 U.S. 520; *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353. These cases hold that declaration and determination of public policy are matters for the law makers. *Cf. Muscahany v. Drummond,* 48 S.Ct. 53, 275 U.S. 199, 72 L.Ed. 238. We find no case law to the contrary.

If by Article 1, Section 10 of the Constitution a state cannot pass any law impairing the obligation of contract, by what authority do the Commissioners of the District of Columbia, an administrative body, have such right? The Commissioners have been afforded ample provision for the enforcement of housing regulations by Section 2104 of Article 210 and Section 3303 of Article 310.

Point Three: Do the Commissioners of the District of Columbia Have the Right To Impair the Obligation of Contracts Involving Tenancy Relationship and by the Tenant Obtaining Possession Under the Lease Agreement Which Is Declared Void, Thus Permitting the Tenant to Remain in Perpetuity?

By the decision of the District of Columbia Court of Appeals the broad principle is declared that a tenancy agreement entered into at a time when the premises are in violation of the housing code, is void and unenforceable. Under such interpretation of the law a tenant may remain in possession indefinitely, without any payment for use and value of the occupancy.

Even if the Commissioners had a right to declare such contracts void, would not such declaration violate Article 1

Section 10? Would not its effect in this case be a taking of petitioner's property without due process? If the tenant gains possession and the lease is declared void, and then the tenant fails to vacate, would not such be a taking of property without due process? The District of Columbia Court of Appeals, by its order denying rehearing, recognized this question but did not pass upon it, notwithstanding the provision of the housing code, Section 2301 of Article 230. Such taking, in this present posture, runs in perpetuity.

The questions presented here for review involve special and extremely important reasons for this Honorable Court to take this case and are similarly tied to questions which affect the entire nation. Habib v. Edwards was presented to this Court on petition for writ of certiorari on October 9, 1968. Both of these cases are so extremely important that almost all of the law school journals or reviews have discussed them, and the demand for briefs from law schools, teachers and general practitioners has been unprecedented.

We believe the lower court rulings abolish the whole structure of the common law of property which had been built up over a period of hundreds of years and give rise to pertinent questions:

What is the status of the tenant in possession under a void lease?

If the housing code is violated, can it be claimed that the landlord, a wrongdoer, cannot obtain possession?

If Section 2301 of Article 230 makes it unlawful for the tenant to occupy, how is the tenancy vacated, and if there is a method, how long will it take?

In single and double family premises where no license is required—and such types of housing are expressly exempt—why does the housing code cover such premises? (See Title 47-2328 D.C. Code, 1967 Ed.

If the tenant remains in possession at the time it is determined that the lease is void, is he absolved from payment of any sums for use and occupancy?

Since the lease is declared void *ab initio*, can the tenant reclaim all rent paid?

PRAYER

WHEREFORE, the petitioner prays that he may be granted a writ of certiorari and that this Honorable Court consider the certified transcript of record filed, and on hearing, that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed. And the petitioner further prays for such other general relief as may be meet and proper.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4199

LILLIE BROWN, APPELLANT,

v.

SOUTHALL REALTY COMPANY, APPELLEE.

Appeal from the District of Columbia
Court of General Sessions

(Argued December 11, 1967 Decided February 7, 1968)

Florence Wagman Roisman for appellant. *Thomas E. Willging* and *Michael Frank*, were on the brief, for appellant.

No appearance for appellee.

Before HOOD, Chief Judge, MYERS, Associate Judge, and QUINN (Associate Judge, Retired).

QUINN, J.: This appeal arises out of an action for possession brought by appellee-landlord, against appellant-tenant, Mrs. Brown, for nonpayment of rent. The parties stipulated, at the time of trial, that the rent was in the arrears in the amount of $230.00. Mrs. Brown contended, however, that no rent was due under the lease because it was an illegal contract. The court held to the contrary and awarded appellee possession for nonpayment of rent.

Although counsel for appellant stated at oral argument before this court that Mrs. Brown had moved from the premises and did not wish to be returned to possession, she asserts that this court should hear this appeal because the judgment of the court below would render certain facts res judicata in any subsequent suit for rent.[1] In *Bess v.*

[1] Edwards v. Habib, D.C.App., 227 A.2d 388 (1967); Bess v. David, D.C.Mun.App., 140 A.2d 316 (1958); David v. Nemerofsky, D.C.Mun.App., 41 A.2d 838 (1945).

David, supra, a suit by a landlord against a tenant for recovery of rent owed, defendant contended that he did not owe rent because he was not a tenant during the time alleged. The defendant was, however, denied that defense, this court stating on appeal that ". . . we think *any* question of appellant's tenancy is foreclosed by the judgment in the previous *possessory* action." (Emphasis supplied.) 140 A.2d 317.

Thus, because the validity of the lease and the determination that rent is owing will be irrevocably established in this case if the judgment of the trial court is allowed to stand,[2] we feel that this appeal is timely made.

Although appellant notes a number of errors, we consider the allegation that the trial court erred in failing to declare the lease agreement void as an illegal contract both meritorious and completely dispositive, and for this reason we reverse.

The evidence developed, at the trial, revealed that prior to the signing of the lease agreement, appellee was on notice that certain Housing Code violations existed on the premises in question. An inspector for the District of Columbia Housing Division of the Department of Licenses and Inspections testified that the violations, an obstructed commode, a broken railing and insufficient ceiling height in the basement, existed at least some months prior to the lease agreement and had not been abated at the time of trial. He also stated that the basement violations prohibited the use of the entire basement as a dwelling place. Counsel for appellant at the trial below elicited an admission from the appellee that "he told the defendant after the lease had been signed that the back room of the basement was habitable despite the Housing Code Violations." In addition, a Mr. Sinkler Penn, the owner of the premises in question, was called as an adverse witness by the defense. He testified that "he had submitted a sworn statement to the Housing Division on December 8, 1964 to the effect that

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[2] *Note* in Bess v. David, *supra,* this court cited with approval the following language from McCotter v. Flinn, 30 Misc. 119, 61 N.Y.S. 786, 787 (1899): "A judgment taken by default in summary proceedings by a landlord for non-payment of rent is conclusive between the parties as to the existence and *validity* of the lease, the occupation by the tenant, and that *rent is due,* and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings." (Emphasis supplied.)

the basement was unoccupied at that time and would continue to be kept vacant until the violations were corrected."

This evidence having been established and uncontroverted, appellant contends that the lease should have been declared unenforceable because it was entered into in contravention to the District of Columbia Housing Regulations, and knowingly so.

Section 2304 of the District of Columbia Housing Regulations reads as follows:

> No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.

Section 2501 of these same Regulations, states:

> Every premises accomodating one or more habitations shall be maintained and kept in repair so as to provide decent living accomodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.

It appears that the violations known by appellee to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the "habitation" unsafe and unsanitary. Neither had the premises been maintained or repaired to the degree contemplated by the regulations, i.e., "designed to make a premises . . . healthy and safe." The lease contract was, therefore, entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.

In the case of *Hartman v. Lubar*, 77 U.S.App.D.C. 95, 96, 133 F.2d 44, 45 (1942), *cert. denied*, 319 U.S. 767 (1943), the court stated that, "[t]he general rule is that an illegal contract, made in violation of the statutory prohibition designed for police or regulatory purposes, is void and

confers no right upon the wrongdoer."[3] The court in *Lloyd v. Johnson*, 45 App.D.C. 322, 327 (1916), indicated:

> To this general rule, however, the courts have found exceptions. For the exception, resort must be had to the intent of the legislature, as well as the subject matter of the legislation. The test for the application of the exception is pointed out in *Pangborn v. Westlake*, 36 Iowa 546, 549, and approved in *Miller v. Ammon*, 145 U.S. 421, 426, 36 L. ed. 759, 762, 12 Sup.Ct.Rep. 884, as follows: "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the court will so hold and construe the statute accordingly."

Applying this general rule to the Housing Regulations, it may be stated initially that they do provide for penalties for violations.[4] A reading of Sections 2304 and 2501 infers that the Commissioners of the District of Columbia, in promulgating these Housing Regulations, were endeavoring to regulate the rental of housing in the District and to insure for the prospective tenants that these rental units would be "habitable" and maintained as such.[5] The public policy considerations are adequately stated in Section 2101 of the District of Columbia Housing Regulations, entitled "Purpose of Regulations." To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement (i.e., obstructed commode, broken railing, and insufficient ceiling height in

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[3] *See also* Kirschner v. Klavik, D.C.Mun.App., 186 A.2d 227 (1962), and Rubin v. Douglas, D.C.Mun.App., 59 A.2d 690 (1948).

[4] *See* Washington, D. C., Housing Regulations, § 2104 (1955).

[5] *Note* the use of the word "shall" in both §§ 2304 and 2501 of the Housing Regulations. The word "shall" ordinarily connotes language of command. Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Ballou v. Kemp, 68 U.S.App. D.C. 7, 92 F.2d 556 (1937).

the basement), would be to flout the evident purposes for which Sections 2304 and 2501 were enacted. The more reasonable view is, therefore, that where such conditions exist on a leasehold prior to an agreement to lease, the letting of such premises constitutes a violation of Sections 2304 and 2501 of the Housing Regulations, and that these Sections do indeed "imply a prohibition" so as "to render the prohibited act void." Neither does there exist any reason to treat a lease agreement differently from any other contract in this regard.[6]

Thus, for this reason and those stated above, we reverse.

Reversed.

[6] *See* Jess Fisher & Co. v. Hicks, D.C.Mun.App., 86 A.2d 177 (1952), where a lease agreement was held ineffective because it violated the District of Columbia Rent Control Act. *Cf.* Amos v. Cummings, D.C.Mun.App., 67 A.2d 687 (1949).

[Filed April 17, 1968]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4199 January Term, 1968

LILLIE BROWN, Appellant,

v. L&T 60869-66

SOUTHALL REALTY COMPANY, Appellee.

Before: Hood, Chief Judge, Myers, Associate Judge, and Quinn (Associate Judge, Retired).

ORDER ON REHEARING

After rehearing with briefs and oral argument by the parties, the court adheres to its former decision reported in 237 A.2d 834. Because of certain arguments advanced at rehearing, we add the following:

1. In our former decision we ruled that where the owner of a dwelling property, knowing that Housing Code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced.

2. In our former decision we did not rule, and we do not rule, upon any right of the tenant under such a lease to remain in the property or upon any obligation of the tenant to pay for the reasonable value of the use of the property during his occupancy. Those questions were not, and are not, before us.

Per Curiam.

April 17, 1968

Copies to:

(Trial Judge)

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[Filed July 16, 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21874 September Term, 1967

McGordon Southall T/A
Southall Realty Company, Petitioner

v.

Lillie Brown, Respondent

Before: Wright, McGowan, and Tamm, Circuit Judges, in Chambers.

ORDER

On consideration of petitioner's petition for the allowance of an appeal from the District of Columbia Court of Appeals, of petitioner's brief in support thereof, and respondent's brief in opposition thereto, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam.

Circuit Judge Wright did not participate in the foregoing order.